



# New copyright law stirs up controversy in New Zealand

**A three strikes and you're out law with regard to illegal file sharing will come into force in New Zealand in September. It has attracted both strong support and bitter opposition**

The controversial Copyright (Infringing File Sharing) Amendment Bill became law in New Zealand in April, with the majority of its provisions to come into effect on 1st September 2011.

The bill, commonly known as the three strikes legislation, was passed under urgency and amends New Zealand's Copyright Act 1994. It has generated considerable controversy and extensive media coverage in New Zealand – not least because many opponents believe it was inappropriate for Parliament to rush through such a contentious bill under an urgency order intended to deal with the Christchurch earthquake.

The new legislation includes provisions dealing with copyright infringement over the internet and has implications for all New Zealanders – most obviously those involved in sharing/downloading music or movies without authorisation, but also potentially for their employers.

File sharing is defined in the bill as occurring where “material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users”. The uploading and downloading need not take place at the same time.

The law repeals Section 92A of the Copyright Act (enacted by Section 53 of the Copyright (New Technologies and Performers Rights) Amendment Act 2008), which would have required internet service providers (ISPs) to adopt a policy providing for the termination of a repeat infringer's internet account.

Various civil liberty groups protested against Section 92A and the section also raised considerable debate among academics and lawyers (as have similar provisions around the world – for example, France's HADOPI regime and the UK Digital Economy Bill 2010). As a result,

Section 92A was never brought into force.

The new law implements a three-strike notice regime to deter illegal file sharing:

- Rights owners may initiate an action by providing an ISP (or, more specifically, an internet protocol address provider (IPAP)) with information that identifies an IP address from which copyright infringement by way of file sharing is alleged to have occurred.
- The IPAP must then issue a warning notice to the holder of the account from which the infringement emanates.
- After three warnings, if the user does not stop, the copyright owner can take a claim to the Copyright Tribunal.
- The tribunal has the power to impose a maximum US\$15,000 penalty on the internet account holder.

The jurisdiction of the Copyright Tribunal has been extended to enable this regime to operate. It aims to provide a fast track, low cost process to decide on illegal file sharing claims. However, many observers remain sceptical as to whether this will be the case, given the size of the tribunal (currently three part-time members) relative to the anticipated workload.

The term IPAP has been introduced in an attempt to focus on the function of an ISP that is relevant to infringing file sharing – namely, the provision of internet protocol addresses (as opposed to every entity that is providing internet services).

One of the most controversial parts of the bill, as originally proposed, provided for a district court to suspend an internet account for up to six months, in appropriate circumstances.

Under the legislation as passed, the power to suspend an account has effectively been delayed by virtue of a new Section 122PA, whereby such a suspension cannot be applied for until a date set by order in council – which may be made by the governor general on the recommendation of the justice minister.

It is expected that the issue of internet suspension will be reviewed in two years' time, in conjunction with the five-year review of the digital copyright amendments

that were passed in 2008. It is likely to be implemented if the minister is persuaded that the notice process and the remedies in the Copyright Tribunal are proving ineffective. The law will not apply to cell phone networks until 2013.

Proponents of the internet suspension are optimistic that the legislation will discourage illegal file sharing and provide more effective measures to assist rights holders in enforcing their copyright. They acknowledge that the Copyright Act, prior to the introduction of this new law, already provided civil and criminal sanctions for infringement of copyright. However, in practice (as is the case in other jurisdictions), current enforcement measures have proved ineffective in countering infringing file sharing.

Meanwhile, on the other side of the equation, opponents of the law have been vocal in their opposition, reigniting a campaign to black out their social network avatars (or photos), first introduced – to worldwide publicity – when the original Section 92A was introduced.

Overall, the new law appears to be a step in the right direction towards reducing illegal file sharing in New Zealand. It provides the basis for a new framework for dealing with copyright-infringing behaviour and has real potential to provide a cost-effective, credible regime to deter individuals from infringing via peer-to-peer file sharing, while at the same time ensuring to a great extent that the privacy of individuals is respected and that the measures are proportionate to the infringing actions.

However, there are a number of issues yet to be resolved, including the amounts payable by rights holders to ISPs to process a warning notice. These will have a significant impact on the system is workable in practice. These issues will doubtless be sorted out over the coming months. Until then, one thing is certain: the law will continue to generate considerable controversy.

**Claire Deeks** is a senior associate and **Ian Finch** a partner at James & Wells Intellectual Property Lawyers in New Zealand